No. 44800-9-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

BRIAN BESAW, et ux,

Appellants,

v.

PIERCE COUNTY, et al.,

Respondents.

APPELLANT'S REPLY BRIEF

THADDEUS P. MARTIN
Attorney at Law
Thaddeus P. Martin, WSBA # 28175
Attorney for Appellants
tmartin@thadlaw.com

4928 109th St. SW
Lakewood, WA 98499
(253) 682-3420

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PATTERN INSTRUCTIONS

RCW

PIERCE COUNTY CODE

APPENDIX

I. INTRODUCTION TO APPELLANT'S REPLY

It is humbly submitted that the condescending tone of Respondent's, (Pierce County's) Opening Brief, is unwarranted, as well as troublesome. As explored below, simply because Appellant does not agree with the County's version of the facts is not a basis for ruling in the County's favor, particularly when under summary judgment standards, all facts must be viewed in a light most favorable to the moving party, who also gets the benefit of all reasonable inferences. Additionally, a party opposing a motion for summary judgment is entitled to rely not only on direct evidence but also circumstantial evidence. See *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013).

Summary judgment's cannot be granted or denied based on the non-mvoing party's conclusory allegations and/or argumentative assertions. See *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Below, and in Appellant's Opening Brief, Appellant primarily relied on Pierce County's own documents as a basis for the factual background of this case. While Pierce County may have a different interpretation of what transpired, such a difference in interpretation does nothing more than create a genuine issue of material fact. Additionally, the County's litigation interpretation of its own documents was and is

unsupported from any testimony by a person with knowledge and is nothing more than defense counsel's argumentative assertions as to the meaning of the documents. Such argumentative assertions should be disregarded.

Even if a small portion of Appellant's version of the facts are ultimately determined to be based on misperceptions, nevertheless there was more than ample evidence before the Trial Court warranting the denial of summary judgment in this matter.

As indicated above, the positions set forth within Respondent's Opening Brief, are also troubling. They are troubling because it appears that Pierce County is purposely picking and choosing those portions of its animal control ordinances which favors its position while ignoring those provisions which do not.

Equally troubling is Pierce County's apparent misapprehensions with respect to the content and scope of this Court's opinion in *Gorman v. Pierce County*, 176 Wn. App. 63, 307 P.3 795 (2013). One hopes that the County's position regarding *Gorman*, (as set forth within its opening brief), is simply a "litigation position" not reflective of how County animal control personnel are being advised regarding their obligations not only under Pierce County's own animal control ordinances, but also under the terms of RCW 16.08.et. seq. Indeed, as explored below, it appears that the

County's, 2009 ordinance, in part, is inconsistent with some of the duties imposed upon local governmental entities by the legislature in RCW 16.08.et. seq. Such inconsistency is problematic.

By its terms RCW 16.08.080(9) permits local governmental entities, such as Pierce County, to be more restrictive than what is required under the terms of this statutory scheme. See *Rabon v. City of Seattle*, 135 Wn.2d 278, 290, 957 P.2d 621 (1998). A local ordinance cannot be **less restrictive** than State law without offending Washington State Constitution Article 11, Section 11. As explained in *Rabon* at Page 292:

> "An ordinance also violates Constitution Article 11, Section 11 if it directly and irreconcilably conflicts with a State statute. If the two enactments can be harmonized, however no conflict will be found. Unconstitutional conflict is found where an ordinance permits that which is forbidden by State law, or prohibits that which State law permits." (Citations omitted)

What appears to be an argument made for the first time on appeal, the County asserts that the "failure to enforce exception" to "the public duty doctrine" does not apply in this case, (unlike *Gorman*), because the ordinance was amended after the occurrence in *Gorman* and now the County's obligation to classify potentially dangerous dogs is discretionary, as opposed to mandatory. The County makes such an assertion in reliance on PCC 6.07.010, (2009 version), which states the Animal Control

Authority "shall have **the ability** to declare as potentially dangerous...". (Emphasis added) (See Respondent's Brief, Page 28).[1] Even if we assume this language was intended to transform the obligation to declare an animal as "potentially dangerous" from a mandatory duty to a matter of discretion, such efforts on the part of the County would be violative of the constitutional provision discussed in *Rabon*. This is because clearly under the terms of a empowering statutory scheme, RCW 16.08.et. seq. local governmental entities, such as Pierce County, have a mandatory obligation to take corrective action. For example, RCW 16.08.090(2) specifically mandates "potentially dangerous dogs **shall be regulated** only by local, admissible and county ordinances." This language suggests that local governmental entities are obligated to regulate "potentially dangerous dogs" and cannot subvert such mandates by making such an obligation merely discretionary. Further, RCW 16.08.100(1) indicates "any dangerous dog **shall** be immediately confiscated by an Animal Control Authority", under the conditions set forth within the body of its text. Again, the legislature has mandated that local governmental entities must act when operating under the auspices of this statutory scheme. As

[1] It is humbly submitted that the language in this 2009 ordinance is far from a model of clarity and frankly makes little sense. The County always had "the ability" to declare an dog as a potential dangerous dog due to the operation of RCW 16.08 et. seq.

Gorman indicates when "shall" is used in an ordinance or statute it is a mandatory provision.

The mandatory nature of such an obligation is fully supported by the Court of Appeals opinion in *King v. Hutson*, 97 Wn. App. 590, 594-95, 987 P.2d 655 (1999) which looked to RCW 16.8 as the source of a local governmental entities duties relating to potentially dangerous dogs, (and not local ordinances).[2]

Along the same lines, Pierce County also makes a fallacious argument that even if the County had evaluated whether or not the pit bulls at issue were "dangerous" dogs, it would have made no difference because the owner was keeping the dogs inside his home at the time of the

---

[2] At page 23 of Respondent's Opening Brief at Footnote 7 the County makes a rather fanciful argument regarding CR 9(i) suggesting that this court cannot consider County ordinances which were not specifically set forth within the plaintiff's complaint. Initially it is noted that this issue does not appear to have been raised below thus it was waived. See *Pettit v. Dwoskin*, 116 Wn. App. 466, 470, 68 P.3d 1088 (2003). Further, CR 9(i) primarily addresses how the content of an ordinance will be subject to proof, and whether or not it can be subject to judicial notice. See generally *Halvorson v. Dahl*, 89 Wn.2d 673, 675, 574 P.2d 1190 (1978) (suggesting that CR 9(i) primarily addresses how one goes about proving the content of an ordinance and nothing more), see also *State v. Martin*, 14 Wn. App. 717, 719, 544 P.2d 750 (1976) (again indicating that CR 9(i) relates to how one goes about proving the content of an ordinance). There is nothing indicating that CR 9(i) is a mandatory pleading requirement in a negligence action where an ordinance is being looked to as being a predicate for the existence of a duty or as evidence as to the scope of the standard of care. See *Joyce v. DOC*, 155 Wn.2d 360, 119 P.3d 825 (2005); RCW 5.40.050 and WPI 60.03. Under the terms of CR 8 and our system of "notice pleading" all that is required is "a short and plain statement of the claim" and a demand for relief in order to file a lawsuit. See *Waples v. Yi*, 169 Wn.2d 158, 234 P.2d 187 (2010). Here, plaintiff is bringing a claim for negligence, and there is no requirement that a plaintiff plead all statutory predicates for the duty which is owed. See *Champagne v. Thurston County*, 163 Wn.2d 69, 84-85, 178 P.3d 936 (2008). Plaintiff's complaint provided the defense with "fair notice" as to what is at issue in this matter and nothing more is required. The defendant's suggestion in Footnote 7 is legally inaccurate and disingenuous.

attack. Thus, according to the County, the dogs were "within a proper enclosure" even without efforts on the part of the County to conduct an evaluation which could have resulted in enforced confinement requirements. The problem with such an argument is that it assumes that a "proper enclosure" would include keeping the potentially dangerous dog within a home, without any additional precautions. Frankly such an argument defies reality and common sense. This is because clearly an individual who are lawfully upon the premises and happens to knock on the door of a home where a "potentially dangerous dog" lives, is equally entitled to the protections of the law as much as an individual out on the street. See RCW 16.08.050 (Defining a person lawfully on property). Taking the County's arguments to its logical extreme would exclude, for example, mailmen or delivery persons statutory protections even though it is common knowledge that they are disproportionately the victims of dog bites.

Further, such a position again highlights inconsistency between state law and the 2009 Pierce County ordinance.

RCW 16.08.070(4) provides a definition of "proper enclosure of a dangerous dog" for the purposes of our animal control laws:

> "(4) "Proper enclosure of a dangerous dog" means while on the owner's property, a dangerous dog shall be **securely confined indoors** or in a securely enclosed and locked pen

> or structure, suitable to prevent the entry of young children and designed to prevent the animal from escaping. Such pens or structures shall have secure sides and a secure top, and shall provide protection from the elements for the dog." (Emphasis added.)

Inconsistently PCC 6.20.010(Z), relied on by the County, fails to require that when the animal is confined indoors that such confinement must be done "securely". This appears to be facially inconsistence with the minimum requirements of State law.

As suggested by *Rabon,* when there is a potential conflict between statute and ordinance the court should take efforts to harmonize the various provisions before declaring the ordinance unconstitutional. The above-referenced inconsistencies can be simply resolved by recognizing that the language utilized in the ordinance is essentially synonymous with the language utilized within the statute, and means the exact same thing.

Further, it is noted that the position taken by the County and its effort at construing the ordinance would, if adopted, create an absurd result.

As discussed in *Gorman,* at Page 78, ordinances are interpreted by utilizing the rules of statutory construction. A fundamental rule of statutory construction is that a statute should not be construed in a manner which results in unlikely, absurd or strained results. See *Cannon v. DOL,*

147 Wn.2d 41, 57, 50 P.3d 627 (2002). It would be "absurd" for Pierce County to enact an ordinance which requires that a dangerous dog be "securely" confined while outdoors, but not securely confined when being kept indoors. Such an interpretation would be irrational and inconsistent with the mandates of Subsection, 070(4) set forth above. It also would be inconsistent with the owners obligation under the common law, to confine a potentially dangerous dog sufficiently, "that is impossible for it to injure anyone." *Arnold v. Laird*, 94 Wn.2d 138, 142, 621 P.2d 138 (1980); See also, *Sligar v. O'Dell*, 156 Wn. App. 720, 233 P.3d 914 (2010).

The fact that the Johnsons' dog was able to "slither" through the front door raises at a minimum a question of fact as to whether or not he was "securely" confined indoors. It was respectfully suggested that in order for a dog "to be securely confined indoors' means something other than simply being behind a closed front door which, when open, provided a ready opportunity for attack.

II. FACTUAL DISCUSSION

A. Pierce County's Own Records Establish That It Had Sufficient Knowledge From Which to Determine That the Dog Who Bit plaintiff Was a "Dangerous Dog" Subject to Enforcement Actions.

Relevant Pierce County ordinances, which were in effect at the time of the injury to the plaintiff, defined a "potentially dangerous dog",

slightly, (and permissibly), broader than that set forth in RCW 16.08.070(2). PCC 6.02.010 provides the following definition:

> "Potentially dangerous animal" means any animal that when provoked: (a) inflicts bites on a human, domestic animal, or livestock either on public or private property, or (b) chases or approaches a person upon the street, sidewalks, or any public grounds or private property in a menacing fashion or apparent attitude of tact, or (c) any animal with known propensity, tendency or disposition to attack and provoke or to cause injury or otherwise to threaten the safety of humans, domestic animals, or livestock on any public or private property.

Under PCC 6.07.010 the following must be shown in order for county officials to seek a declaration that an animal is potentially dangerous:

> (A) The animal control authority shall have the ability to declare an animal as potentially dangerous if there's probable cause to believe the animal falls within the definition set forth within Section 6.02.010(X). The findings must be based upon
>
> > 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of Section 6.02.010(X); or
> >
> > 2. **Animal bite reports filed with the county or county's designee; or**
> >
> > 3. Actions of the animal witnessed by animal control officer or law enforcement officer or
> >
> > 4. **Other substantial evidence.** (Emphasis added).

Despite Pierce County's rather crabbed efforts to distinguish a way its own regards on reasoned analysis there was, and is, at a minimum a

question of fact as to whether or not it had sufficient information, prior to Mr. Besaw's bite, from which it should have commenced an evaluative process to determine whether or not the dog(s) residing at the residence where plaintiff was bit were "dangerous animals" under the terms of its own ordinances. As explained in *Gorman,* at 79, although the County had the discretion to classify or not classify any particular dog as "potentially dangerous", it had a duty to at least apply the classification process to any apparently valid report of a dangerous dog. The county had a duty to act."

As early as August 16, 2008, the County was receiving reports of pit bulls lunging at people walking by the residence. (CP 222) While the purported owner of this dog was someone named "Russo", as early as October 2009 Pierce County records suggest that the pit bull owned by co-defendant Johnson was already residing within the home. (CP 218)By way of a report dated December 18, 2009 it is noted that there were two pit bulls at the residence one older and one a pup "about 5 months old" and "the puppy belongs to his roommate ...". (CP 216) As later established by a report dated January 31, 2010, although Mr. Russo moved out of the residence, his roommate Calvin, (co-defendant Calvin Johnson), continued to live in the house with at least one pit bull pup. (CP 214) That pit bull pup, two days prior, (January 29, 2010 was reported as chasing after a "Shihtzu" belonging to a neighbor. (CP 214) It is again reported

that on February 15, 2010 a pit bull "the younger one", (presumptively the one owned by Calvin Johnson who continued to reside in the residence), was "trying to get the reporting party's cat". (CP 211) In other words at this point in time there were at least two reports that a pit bull owned by Calvin Johnson was engaging in actions which were threatening to the safety of "domestic animals". See RCW 16.08.070(1). See also PCC 6.02.01(O)(X)(c), "Any animal with a known propensity, tendency or disposition to ... or otherwise threaten the safety of ... domestic animals ... on any public or private property".

By May 20, 2010, the County was receiving photographs of the two pit bulls, indicating that they were loose in the neighborhood and were not being properly confined to the owner's yard. (CP 204-209) In September 2010, it was once again being reported that the pit bulls at were once again acting aggressively and scaring the neighbor's Shihtzu. (CP 202)

Tellingly, by June 24, 2011 the County was receiving a report that one of the dogs located at the residence, bit a human being, a fact which was verified when County personnel spoke to Calvin Johnson. (CP 200) Despite this "bite report" no actions were taken to enforce Pierce County's dog control ordinances against the dogs located at the residence prior to the date of July 6, 2011, the date plaintiff received his injuries.

Remarkably despite two reported bites in relatively quick succession the County did not take efforts to serve dangerous dog paperwork, on Calvin Johnson regarding the pit bull which had caused injury to the plaintiff until September 9, 2011.[3] (CP159-170)

Given such a history, and other incidences which are catalogued within the County's own record, prior to plaintiff's injuries, there had been at least one reported bite and at least three incidences where the pit bulls residing at that location had threatened the safety of other domestic animals. See RCW 16.08.070(1)(b). Further, under the terms of PCC 6.07.010(A)(2) there had been at least one "animal bite report" on file with the County (as reflected by its own records) and "other substantial evidence" within the meaning of PCC 6.07.010(A)(4) upon which the County should have acted.[4]

It was respectfully suggested that even though the definition of "potentially dangerous dog" does not expressly include the fact that the

---

[3] Attached hereto as Appendix No. 1 is an incident log which was amongst the County's own record. Although the County now wants to disavow the use of the term "aggressive behavior" as set forth in the log, it is noted that it is the County's own document, and, as such, the plaintiff should have been provided by the Trial Court the benefit of the inferences created by the utilization of such language from the document. (CP 183)

[4] In an apparent effort to confuse the issue the County in its briefing has emphasized the fact that the individual who was bit prior to the plaintiff did not want to file a report, thus, presumptively would not be willing to testify within the meaning of PCC 6.07.010(A)(1). However, even though this individual did not want to testify the County nevertheless had an "animal bite report" as reflected by its own records. It does not appear that in order to have an "animal bite report" as a basis for enforcement action that it is necessary that the individual who was bit be willing to testify.

dogs have been permitted to roam free throughout the neighborhood,(or otherwise are not on a leash or confined), nevertheless such a history should be amongst the "other substantial evidence" that a County should have considered in determining whether or not to commence an evaluation as to whether or not the pit bulls at the location where plaintiff was bit, were "potentially dangerous dogs".

Further, although the record is not particularly specific as to which of the two dogs, (or more), who were residing at the residence, engaged in which activity, it is noted that the case *King v. Hutson*, 97 Wn. App. 590, 596, 97 P.2d 655 (1999) resolves such a concern. In *King,* the Appellate Court had little difficulty in holding that prior reports about threatening behavior regarding a "pack" of dogs was sufficient to create a reasonable inference that the dog which bit, (who was part of the "pack"), had also engaged in such behavior.

Like in *King*, after the first reported dog bite, the dogs arguably could have been immediately classified as "dangerous animal", depending on the severity of the bite the other individual had suffered. See PCC 6.06.010(n).[5]

[5] Under the terms of RCW 16.08.070(1) there is no requirement that the bite inflicted upon a human cause a "severe injury", nor any requirement that the individual who is bit had a previous fear or was frightened by the dog prior to the event.

In this case there was more, or similar, notice to the County that the dogs residing at the residence where plaintiff was bit, were "potentially dangerous", compared to other cases where our appellate courts have found at least a question of fact as to whether or not the County could be subject to liability for the failure to enforce its animal control laws.

For example in *King*, there had only been two prior complaints regarding the dogs in that case, and those complaints had been made over three years prior to the attack which formed the basis of the lawsuit. In *Gorman* there had been a similar number of miscellaneous complaints, as in this case, regarding **dogs** owned by the individual who owned the dog, which injured Ms. Gorman in that case. In *Gorman*, the Court took into consideration the fact that there had been ten other complaints regarding **other dogs** owned by the offending dog's owner.

In *Livingston* the prior complaints which serve to create at least a question of fact as to the "actual knowledge of a statutory violation", were six prior complaints relating to one bite, one act of threatening behavior and four complaints that the dogs were running loose in the neighborhood. See *Livingston v. City of Everett*, 50 Wn. App. 655, 657, 751 P.2d 1199 (1988). Finally, in *Champagne v. Spokane Humane Society*, 47 Wn. App. 887, 889, 737 P.2d 1279 (1987), the governmental agency responsible for animal control in the City of Spokane at that time, had received numerous

complaints about the dogs who ultimately attacked the 5-year-old victim, including complaints that they had acted in a threatening way towards others, and that they were permitted to roam unleashed throughout the neighborhood. The Court also found significant in *Champagne,* the fact that even though numerous complaints had been made regarding the dogs in that case, and there had been several visits to the residence where they resided, the animal control officers had failed to follow up on the complaints or advise the complainants regarding their ability to file formal complaints which could serve to initiate formal enforcement proceedings.

In all of these cases the Appellate Court found that there were questions of facts as to whether or not the government had "actual knowledge" of the potential need to take enforcement action, (or at least to evaluate whether they should do so), even though a number of the prior complaints involved different dogs, different conduct, and/or were simply reports that the dogs were permitted to run about a neighborhood unleashed.

Finally, with respect to factual issues, it is undisputed that the "failure to enforcement" exception to the "public duty doctrine" is applicable when a local governmental entity, such as Pierce County, fails to properly enforce its animal control laws. The *Gorman*, *Livingston*, and *King* case fully established this proposition. In order to establish the

factual element of "actual knowledge of a statutory violation", what must be shown as "knowledge of facts constituting the statutory violation, rather than knowledge of the statutory violation itself, is all that is required". See *Coffel v. Clallam County*, 58 Wn. App. 517, 523, 794 P.2d 513 (1999). Actual knowledge can be shown by both direct and circumstantial evidence. See *Tipton v. Town of Tabor*, 567 N.W.2d 351, 359 (S.D. 1997). Circumstantial evidence sufficient to create a question of fact as to actual knowledge is evidence which shows that the defendant "must have known" and not "should have known" of a particular fact. Id. Whether or not public officials have "actual knowledge" of a violation involves a question of fact even when based upon circumstantial evidence. See *Waite v. Whatcom County*, 54 Wn. App. 682, 687, 775 P.2d 967 (1989).

Based on the above reports, at a minimum there is a "question of fact" as to whether or not the County had "actual knowledge" of the need to take enforcement action under the terms of its own ordinances controlling statutory law.

III. LEGAL DISCUSSION

A. Plaintiff Created At A Minimum A Question Of Fact With Respect To All Elements Of The Failure To Enforce Exception

While one can quibble about the scope of governmental duties and liabilities given the operation of the "public duty doctrine" what the

above-referenced case law makes crystal clear is that the "failure to enforce exception" to the "public duty doctrine", has full application when there are allegations that a local governmental entity failed to properly enforce its animal control ordinances and/or failed to comply with its statutory duties under RCW 16.08.et. seq.

As indicated by *Gorman*, the failure to enforce exception has the following elements:

> "Under the failure to enforce exception, a government obligation to the general public becomes a legal duty owed to the plaintiff when
>
> (1) Government agents who are responsible for enforcing statutory requirements actually know of a statutory violation,
>
> (2) The government agents have a statutory duty to take corrective action but failed to do so, and
>
> (3) The plaintiff is within the class the statue intended to protect. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987).
>
> The plaintiff has the burden to establish each element of the failure to enforce exception, and the court must construe the exception narrowly. *Atherton Condo. Apartment-Owners Ass'n. Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990)."

As previously discussed in this case there is at a minimum a question of fact as to whether or not Pierce County animal control officials had **actual knowledge** of the alleged statutory violation. As in *Gorman,*

Pierce County, prior to plaintiff's bite, had received multiple complaints about Mr. Johnson's dogs yet despite such complaints failed to evaluate whether or not those dogs were "dangerous" within the meaning of its own ordinance and the above-referenced state law definition.

As shown by the case of *King v. Hutson*, *supra*, under provisions of RCW 16.08.et. seq., independent of Pierce County's ordinances, places upon the County a mandatory obligation to regulate potentially dangerous dogs. RCW 16.08.090(2). The statute further mandates that as part of a county's regulatory scheme that it have minimum procedures in place comporting with due process for a determination as to whether or not a "potentially dangerous dog is a 'dangerous dog'", the statute set specific requirements for the owner's maintenance of a "dangerous dog" after such a determination is made. Specifically under the terms of RCW 16.08(4), (5), (6)(a)-(c) once such a determination is made, or an evaluative process is invoked, the County can require the owner of the dog to pay all costs of confinement during the course of any appeals proceedings; require the owner to have a certificate of registration and, importantly can require:

> (a) A proper enclosure to confine a dangerous dog and the posting of the premises with clearly visible warning sign that there is a dangerous dog on the property. In addition, the owner shall conspicuously display a sign with a warning symbol that informs children of the presence of a dangerous dog.

Also it can be required that the owner of a dangerous dog purchase homeowners insurance at a minimum of $250,000.00 of coverage insuring the owner for any personal injuries inflicted by the dangerous dog. It can be required that the dog, when outside of a proper enclosure, be muzzled and restrained by "a responsible person." See RCW 16.08.090(1). Again, as indicated by *King v. Hutson*, the requirements set forth within the statutory scheme are **mandatory**.

Further as discussed above, to the extent that the County has attempted to amend its own ordinances to be less restrictive than state law by affording county officials discretion which otherwise does not exist under the statute, the County cannot do so without offending the requirements of Washington State Constitute Article 11 § 11, see *Rabon v. City of Seattle, supra.*

The County is also wrong that Mr. Besaw was "not within the class of persons the statute was intended to protect". Nowhere in the above-quoted formulation of the "failure to enforce" exception to the public duty doctrine is there any requirement that the class protected by the statute be "a particular circumscribed class of persons". Such a requirement only applies to the "legislative intent" exception to the public duty doctrine. See, for example, *Yonker v. DSHS*, 85 Wn.App. 71, 81-82, 930 P.2d 958,

review denied, 132 Wn.2d 101, 940 P.2d 655 (1997). As noted at Footnote 19 in *Halleran v. Nu West, Inc.*, 123 Wn.App. 701, 711, 98 P.3d 52 (2004):

> "The standard for a statute to identify a 'particular and circumscribed class of persons', for the legislative intent exception is more stringent than what is required to identify a class of persons for the failure to enforce exception. *Waite v. Whatcom County*, 54 Wn.App. 682, 688, 775 P.2d 967 (1989)."

Further, even if such a requirement existed with respect to the "failure to enforce exception" there is simply no question that under the circumstances of this case such a requirement could be met. *Yonkers* provides at Page 79-80 the following:

> "The requirement is not that the class be small or narrow, but that it be 'particular and circumscribed.' 'Particular' means 'involving, affecting or belong to a part rather than the whole or something...not universal.' Webster's Third New International Dictionary 164 (3d ed. 1976). 'Circumscribed' means to set limits or bounds to: ...to define, mark off or demarcate carefully.' Webster's Third New International Dictionary 410 (3d ed. 1976). Neither of these qualifiers necessarily mean that the protected group must be small or narrow. Indeed, such is not a requirement. For example, the class of persons protected in Donnellson, victims of domestic violence, unfortunately cannot be described as small. It is however particularly circumscribed, as is the class sought to be protected here. (Citations omitted).

In *Yonkers* the class to be protected was children who may be subject to child abuse. In *Bailey,* the class subject to protection were all

persons who could potentially be injured by the drunk driver who was not arrested by the law enforcement officer involved in that case. In *Livingston* the class protected was all persons who could be endangered by the dogs who were not subject to enforcement action.

Arguably, the class protected would be all individuals potentially coming into contact with the Johnsons' "potentially dangerous" dogs. However, for the purposes of this appeal the court need not define the outer boundaries of who would be subject to statutory protections. These dogs were located within plaintiff's own neighborhood and there had been numerous complaints generated by Johnsons' neighbors regarding the supervision and activities of the dogs. At a minimum it is respectfully suggested that amongst the class intended to be protected by RCW 16.08.et.seq., and the County's Animal Control ordinances, would be people residing in the same location as the "potentially dangerous dogs", and who would have likely, foreseeable and regular contact with these animals. It is respectfully suggested the County's positions to the contrary frankly defies common sense.

B. It Is For A Jury To Determine Whether Or Not The County's Concurrent Negligence Was A Proximate Cause Of Plaintiff's Injuries.

The County's arguments regarding causation are meritless, and are predicated on apparent misunderstanding what would have been required of these dogs' owners had enforcement action been taken. As indicated in *Champagne* it is well-recognized that negligence of two or more persons may combine to cause an injury, citing to *Mason v. Bitton*, 85 Wn.2d 321, 326, 354 P.2d 1360 (1970). "Although Mr. Mason was negligent in allowing the pit bulls to run loose, it does not follow that the society may not be liable for its later negligence, if any, in failing to apprehend the pit bulls." *Champagne* 47 Wn.App. at 896.

Again it is reiterated that RCW 16.08.070(4) defines "proper enclosure of a dangerous dog" to mean:

> "While on the owner's property, a dangerous dog shall be **securely** confined indoors or in a securely enclosed and locked pen or structure, suitable to prevent the entry of young children and designed to prevent the animal from escaping. Said fence or structures shall have secure sides and a secure top, and shall also provide protection of the elements for the dog. Such a requirement should be interpreted consistent with the common law requirements imposed on the owner which requires that if the owner knows or should know that his dog is potentially dangerous has the obligation to 'confine it so that it is impossible for it to injure anyone'." See *Arnold v. Laird,* 94 Wn.2d at 874.

Here, had enforcement action been taken, at a minimum the owner, in order to keep the dogs, would have been required to present to the

animal control authority "sufficient evidence" that there was "a proper enclosure to confine" the dog. See RCW 16.08.08(6)(a).

It is respectfully suggested that simply because on the day of the bite the owner was keeping the dog indoors is no substitute for government-enforced restrictions on the dog which would have required the owner to prove that there was a "secure" enclosure confining the dog even when indoors. Had such a secure enclosure been in place, the dog would have not "slithered" out of the front door of its owner's residence biting the plaintiff.

At a minimum such an issue is a question of fact for the jury to resolve.

CONCLUSION

On proper analysis of Washington State law and Pierce County's own ordinances, it is very clear that there is at a minimum a question of fact as to whether or not this matter falls within the "failure to enforce exception" to the public duty doctrine. The case law clearly establishes that RCW 16.08.et. seq. and Pierce County's own animal control ordinances create mandatory enforcement duties when there exists actual knowledge of a potential violation. Here, it is almost undisputed that there was "actual knowledge" of sufficient information from which a reasonable animal control officer would have concluded that there was a violation of

the law. Based on direct and circumstantial evidence Pierce County Officials "must have known" of the facts forming the predicate for violations of the law. It is also clear, despite numerous contacts with the dogs located at the residence where plaintiff was bit that no enforcement actions were taken. A reasonable jury could conclude that the absence of such enforcement actions were a "but for" (at least in part) cause of plaintiff's injuries.

As such, it is respectfully prayed, that the Appellate Court reverse the Trial Court's summary judgment decision and remand this matter for a plenary trial.

DATED this 9th day of May 2014.

LAW OFFICE OF THADDEUS P. MARTIN

Thaddeus P. Martin, WSBA 28175
4928 109th St. SW, Lakewood, WA 98499
(253) 682-3420

CERTIFICATE OF SERVICE

I hereby certify that I am not a party to this action and that I placed for service on counsel of record the foregoing document via email followed by legal messenger, on the 9th day of May, 2014.

Persons served:

Dan Hamilton
Pierce County Prosecutor's Office
955 Tacoma Avenue, Ste 301
Tacoma, WA 98402

Signed Kara Denny
Kara Denny, Legal Assistant